No. 11

Supreme Court, U.S.
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In The

Supreme Court of the United States

DWIGHT CAHOON,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not a dismissal with prejudice of a criminal charge on the grounds of statute of limiations operates to constitute an acquittal, for double jeopardy purposes.

Whether or not the State's alternate charge filed after such dismissal, based on the same alleged conduct, violated the petitioner's 5th Amendment constitutional rights of due process and rights against double jeopardy.

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PETITION FOR WRIT OF CERTIORARI

Dwight Cahoon respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINION AND ORDERS BELOW

The opinion of the Utah Supreme Court is reported at *State v. Cahoon*, 203 P.3d 957 (Utah 2009). The opinion of the Utah Court of Appeals is reported at *State v. Cahoon*, 167 P.3d 533 (Utah App. 2007). The order of the First Judicial District Court of Utah, Cache County, denying petitioners' motion to dismiss is unreported, but a transcript of the proceedings is attached.

JURISDICTION

The Utah Supreme Court filed its decision on February 10, 2009. This Court has jurisdiction under 28 U.S.C. §1257(a) to review the State Supreme Court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const., Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Summary of the Facts: In 2004 during a custody battle between Mr. Cahoon and his wife, the wife's sister, a Ms. Nancy Lucchetti contacted the Logan police and alleged that Cahoon had sexually abused her between the years of 1989 and 1992. Lucchetti was twelve (12) years old in 1989. On August 12, 2004 the State filed an Information against the Petitioner charging him with ten (10) counts of Aggravated Sexual Abuse (U.C.A. §76-5-404.1) and ten (10) counts of Forcible Sexual Abuse of a Child (U.C.A. §76-5-404).

Motion to dismiss: The Petitioner moved to dismiss on statute of limitations grounds, the statue having run for these alleged events twelve (12) years earlier. The State conceded the statute of limitations precluded the charges, and agreed to the dismissal of all twenty (20) counts with prejudice. These counts were then

dismissed in open court by the trial judge. R. 65-66, 102-104, 175:3.

Concurrently with this dismissal with prejudice by the trial court and based on exactly the same alleged conduct, the State filed ten (10) counts of Sexual Abuse against the Petitioner in an "amended information" although the dismissal with prejudice functioned as an acquittal and the case had previously been closed. The crime of Sexual Abuse was charged by the State because Sexual Abuse had a different statute of limitations. The State's second charge contained ten (10) counts of exactly the same alleged conduct of charges and counts that were previously dismissed by the trial judge with prejudice.

Motion to dismiss second charges: The amended information charging Cahoon was filed on the same day, and was filed under a different statute to get around the statute of limitations. Cahoon filed a motion to dismiss the new charges, objecting to the new filing on grounds that the filing constituted double jeopardy. Citing the protection against double jeopardy, after an acquittal, as guaranteed by the Fifth Amendment of the U.S. Constitution the Petitioner pointed out, that the trial judge's dismissal with prejudice was an acquittal based on the statute of limitations which invoked jeopardy for those acts alleged. The trial court denied the motion to dismiss and Cahoon pled guilty to two of the charges in a plea bargain that specifically preserved his right to appeal on constitutional grounds.

Utah Court of Appeals Decision: Cahoon appealed the decision to the Utah Court of Appeals which agreed with the Petitioner, that the dismissal with prejudice was an acquittal and the double jeopardy guarantees protected him against a second trial for the same alleged offenses.

Notably, the Court of Appeals relied on the long standing U.S. Supreme Court decision of *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916). The Utah Court of Appeals,[1] in reversing the trial court quoted the holding in *Oppenheimer*,

> [i]t cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empanelled. . . .

Utah Supreme Court Decision: The State then petitioned the Supreme Court on Writ of Certiorari to the Utah Court of Appeals and on February 10, 2009 entered a decision reversing the Utah Court of Appeals. In the process the Utah Supreme Court effectively reversed this Court's decision of *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61

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[1] See *State v. Cahoon*, 167 P.3d 533, 536 (Utah App. 2007) attached in the addendum.

L.Ed. 161 (1916). In essence, the Utah Supreme Court ruled that although nowhere in the decision are the words collateral estoppel used, that Justice Oliver Wendell Holmes Jr. really meant "collateral estoppel" when he wrote "double jeopardy."

The Utah Supreme Court ruled: "The United States Supreme Court held that a criminal petitioner is protected by both collateral estoppel and double jeopardy,"

> "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." [Quoting *Oppenheimer*].

The Utah Supreme Court went on to state, "Having established that a criminal petitioner is protected by collateral estoppel, the Court then held that collateral estoppel protected Oppenheimer from the prosecution of charges *identical* to those originally barred by a finding that they violated the statute of limitations,"

> [A] judgment for the petitioner upon the ground that the prosecution is barred goes to his liability as a matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits, . . . and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. . . . "Where a criminal charge has been adjudicated upon by a court having

> jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings." [Again quoting *Oppenheimer*].

The Utah Court, apparently overruling *Oppenheimer*, then concluded,

> Thus, the Court in *Oppenheimer* discussed both double jeopardy and collateral estoppel but held that collateral estoppel, not double jeopardy, barred the government from bringing identical charges against a petitioner after a pretrial dismissal.

(*State v. Cahoon*, 203 P.3d 957 (Utah 2009)).

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT AMONG CIRCUITS AND AMONG STATE APPELLATE COURTS AS TO WHETHER OR NOT A DISMISSAL WITH PREJUDICE OF A CRIMINAL CHARGE ON THE GROUNDS OF STATUTE OF LIMITATIONS OPERATES TO CONSTITUTE AN ACQUITTAL, FOR DOUBLE JEOPARDY PURPOSES; AND WHETHER OR NOT THE STATE'S ALTERNATE CHARGE FILED AFTER SUCH DISMISSAL, BASED ON THE SAME ALLEGED CONDUCT, VIOLATED THE PETITIONER'S FIFTH AMENDMENT CONSTITUTIONAL RIGHTS OF DUE PROCESS AND RIGHTS AGAINST DOUBLE JEOPARDY.

Nearly 100 years ago the venerated Justice Oliver Wendell Holmes Jr. authored the opinion of *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916). In that decision the Court was presented with a factual scenario almost identical to the one presented to this Court one century later. Justice Holmes, in a well reasoned and masterfully written decision ruled that an indictment, once dismissed on the grounds a statute of limitations, constituted jeopardy against a criminal petitioner prohibiting any later prosecution for the same conduct.

Jurisprudence in the United States, dating back to its roots in England, and codified by the Utah Legislature in its continued revision of the statute of limitations in U.C.A. 1953 §76-1-302, has given respect and meaning to the rule of statute of limitations. Indeed, time is the sole element of a defense based upon the statute's application. According to the United State Supreme Court in *U.S. v. Kubrick*, 100 S.Ct. 352 (1979), the statute of limitations represents legislative judgment: not only that it is unjust to fail to give a petitioner notice within a specified period of time, but also that there is a fundamental right to be free of stale claims and that this right comes to prevail over the right to prosecute. See also 28 U.S.C. §2401(b). The statute of limitations pertaining to felonies as charged in the case at hand is found in U.C.A. 1953 §76-1-302(2)(a)&(b). This statute provides, in no uncertain terms, that the conduct alleged in the case before this Court is barred by the statute of limitations.

This necessity to prove or disprove the fact of the time a crime was committed and the time it must be prosecuted is discussed as far back as 1623 in England, where the roots of the time limitation for a prosecution to bring its claim specified period was developed. See *Hart v. Deshong*, 40 Del. 218, 8 A.2d 85 (Super. Ct. 1939). Numerous courts have continued to see the statute of limitations as of utmost importance, liberally interpreting statutes of limitations to bar antiquated claims over and over again, all over the country, to many types of claims, from the 1800's

on. See *Wood v. Carpenter*, 101 U.S. 135 (1879); *U.S. v. Oregon Lumber Co.*, 260 U.S. 290 (1922); *Lynch v. American Motorists Ins. Co.*, 101 F. Supp. 946 (N.D. Tex. 1951).

This Court in *Burnett v. New York Cent. R. Co.*, 85 S.Ct. 1050 (1965) stated that fairness to petitioners is the primary reason that statutes of limitations have been designed: to promote justice by preventing surprise via claims in which evidence may have been lost, memories may have faded, and witnesses may have disappeared.

Statutes of limitation are not simple technicalities, but have been long respected as fundamental to a well-ordered judicial system according to *Board of Regents of University of State of N.Y. v. Tomanio*, 100 S.Ct. 1790 (1980). This case from the Supreme Court explains that statutes of limitation afford plaintiffs what legislature deems is reasonable time to bring their claims, protect petitioners, and protect courts from cases in which the search for truth may be seriously impaired by loss of evidence: i.e., by the disappearance of witnesses, fading memories, disappearance of documents, or otherwise. See also 28 U.S.C. § 2401(b). As in the case at bar, where twelve (12) years have passed, allowing the prosecution to bring this claim goes against case law dating back to the 1600's.

Rather, it has been common, dating back to the 1920's, for courts to give the statute of limitations an extended interpretation to include persons and causes

not within the strict letter of the statute. (*Fleischmann Const. Co. v. U.S., to Use of Forsberg*, 270 U.S. 349 (1926)).

In the case at hand, the alleged conduct was reported to the local police over twelve (12) years after the alleged commission, and the action was commenced, likewise, over twelve (12) years after the alleged commission. It is informative to note that these claims were commenced only after a custody battle had begun, and were made by the sister of the wife involved in the custody battle. Given the type of allegation, the ability of any petitioner to fight the allegations would be compromised by the long passage of time. Based on the Utah statute of limitations and these facts, the Petitioner cannot be prosecuted for these crimes. This was the intention of the legislature in creating U.C.A. 1953 § 76-1-302(1)(a) (Utah Legislature 61 (2003), Effective May 5, 2003, Approved March 15, 2003), and later in 2005, reiterated even more clearly by the legislature in the creation of U.C.A. 1953 § 76-1-302(2)(d)(e) (2005), which restates that §76-5-404 and §76-5-405 are felonies.

This is the law. It was the law at the time the State brought the charges against the Petitioner in 2004. The Utah Supreme Court ignored centuries of precedent and ruled that this law should be ignored due to the picking-apart of sentences from past cases discussing what constitutes an acquittal. This holding is a belittlement of not only the legislature and its intent in the creation of these laws to minimize

charges based on faded memories and blurred facts over time, but also a belittlement of this Court's holding in the *Oppenheimer* decision. The Utah Supreme Court's ruling that the statute of limitations is not a fact to be proven or disproven in a case is a blatant disregard for the importance of a Petitioner's constitutional rights.

In the case at bar, the statute of limitations for the felonies charged were four (4) years and the alleged offenses were said to have taken place twelve (12) years prior. Because the law prevented the State from prosecuting this claim when the Petitioner raised and proved this time element, the case had to be dismissed. This dismissal with prejudice, was, like in *Oppenheimer*, accomplished *with the prosecution's acquiescence*. This factual evidence of the time in which the offenses allegedly occurred and the time the prosecution brought the claim, determined the outcome of this case. In this manner, time in the context of the statute of limitations was a fact that had to be disproved by the prosecution to go forward with its case. Because the prosecution could not do so – could not overcome the applicable statute – this fact that the statute of limitations had run was decided in favor of the Petitioner.

Most courts have correctly followed the holding and logic of Justice Holmes in *Oppenheimer*. In *United States v. Hill*, 473 F.2d 759, 762 (C.A.9, 1972) the 9th Circuit held that a pretrial dismissal on statute of limitations grounds bars a subsequent prosecution of the same criminal activity. Likewise,

the 6th Circuit,[2] in *Richardson v. Quarles*, 85 F.3d 629, 1996 WL 250499, 3 (C.A.6, 1996) recognized the longstanding precedent of *Oppenheimer*, but distinguished the facts in their case stating,

> If, in the situation before us here, Sharoc Richardson had once been set free "as a matter of substantive law," *Oppenheimer* suggests that "a fundamental principle of justice" would have been violated by a new prosecution.

In *Washington v. U.S.*, 366 A.2d 457, 460 (D.C. 1976) the court stated, "*Oppenheimer* involved a prosecution which was declared barred by the statute of limitations. A plea of the statute of limitations is a plea to the merits and goes to liability as a matter of substantive law."

Unfortunately, over the years, some courts have ignored the reasoning set forth in *Oppenheimer*. In *Paradise v. CCI Warden*, 136 F.3d 331, 336 (C.A.2, 1998) the 2nd Circuit allowed the filing of a capital murder charge after a non-capital charge had been dismissed on statute of limitation grounds.

In the present case, the Utah Supreme Court cited *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570, 97 S.Ct. 1349, 1354 (1977) and *Serfass v. U.S.*, 420 U.S. 377, 387, 95 S.Ct. 1055, 1062 (1975)

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[2] See also *U.S. v. Pi*, 174 F.3d 745, 750 (C.A.6, 1999).

to support their proposition that *Oppenheimer* had been supplanted. They misread these decisions. In both cases, this Court was presented with a very different factual basis for its decision. In both cases, the government was appealing an order of dismissal that was not agreed upon. Whereas, in *Oppenheimer* as well as in the case at bar, the prosecution acquiesced to the dismissals after acknowledging that the statute of limitations barred prosecution of the offenses charged.

In the case of *Ball v. U.S.*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), the Court was presented with a factual situation wherein three petitioners had been charged with murder, and tried in a joint trial. The jury returned a verdict of guilt against two of the individuals and an acquittal against petitioner Ball. On appeal, the other two petitioners obtained a reversal of the conviction based upon a defective indictment, which had failed to specify jurisdiction and time. The matter was then brought before the grand jury which indicted all three individuals again with murder. Petitioner Ball objected on the grounds of double jeopardy, yet was tried and convicted of murder. This Court reversed that conviction stating,

> That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming, too, from the officer *668 who drew the indictment, seems not to comport with that universal and humane principle of criminal law 'that no man shall

> be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? (*Ball v. U.S.*, 163 U.S. 662, 667-668, 16 S.Ct. 1192, 1194 (1896)).

Regarding the attachment of Double Jeopardy in circumstances of acquittal, in each of the following cases the Supreme Court of the United States held that that a fundamental purpose of the Double Jeopardy Clause is to protect acquittals based on the resolution of factual elements of an offense: *United States v. DiFrancesco*, 449 U.S. 117, 129-130 (1980); *United States v. Scott*, 437 U.S. 82 (1978); *Burks v. United States*, 437 U.S. 1, 16 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

This Court has always held that the law "attaches particular significance to an acquittal." (See *United States v. Scott*, 437 U.S. 82, at 91 (1978)) In the *Scott* decision this Court quotes a 1962 case highlighting this fact in light of Double Jeopardy,

> "An acquittal is accorded special weight. 'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted petitioner may not be retried even though' "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

In the case of *United States v. DiFrancesco*, 449 U.S. 117, at 129-130 (1980), the Court's rationale behind the principle according acquittals special weight is that an appeal or retrial following an acquittal would produce "an unacceptably high risk that the Government, with its superior resources, would wear down a petitioner, thereby 'enhancing the possibility that even though innocent he may be found guilty.'" *United States v. DiFrancesco*, 449 U.S. 117, at 129-130 (1980).

The Supreme Court of Utah, in its decision in the present case has opened a potential legal Pandora's box, the result of which could undermine the very foundation of the American criminal justice system. If, as the Utah Supreme Court held, a dismissal with prejudice, based upon a stipulation of the prosecution and the defense, does not constitute an acquittal for purposes of double jeopardy, virtually every plea bargain does not have the finality that has traditionally been afforded such negotiations. By way of example, normally, when the prosecution and the defense enter into a plea bargain where some counts are dismissed with prejudice in exchange for a guilty plea to other counts, these dismissals are normally afforded the finality of jeopardy. Under the Utah court's ruling in *Cahoon*, a dismissal with prejudice does not constitute jeopardy, since they were disposed of without trial. In the above hypothetical, it is possible that the prosecution determines that the sentence given is too lenient and decides to re-indict the petitioner on the dismissed charges. Under the

current *Cahoon* decision, since jeopardy has not attached on these charges dismissed with prejudice, the prosecution could indeed proceed on a new indictment. Certainly, under those circumstances the plea bargain would then be overturned and the conviction on the original plea would likewise be vacated, however any finality in criminal proceedings would be lost. The danger to a petitioner in the above hypothetical is enormous. The petitioner could have potentially served a significant portion of a prison sentence only to find his dismissed charges refiled.

The majority of courts have followed the reasoning in *Oppenheimer* in this regard. See *U.S. v. Jerry*, 487 F.2d 600, 606 (C.A.3, 1973), where the court held,

> Jerry must be considered to have been convicted by the entry of his plea of guilty just as if a jury had found a verdict of guilty against him, and jeopardy therefore attached with the acceptance of his guilty plea by the district court.

Likewise, in *U.S. v. Faber*, 57 F.3d 873, 874 (C.A.9, 1995), the 9th Circuit ruled, "Jeopardy ordinarily attaches in a criminal proceeding when the court accepts a plea agreement." The danger represented by *Cahoon* is the potential undoing of any plea bargain since none of the dismissed charges have been litigated at trial, and therefore are not afforded the protection of jeopardy. It is the conclusion the Utah Supreme Court sets forth in *Cahoon* which presents the problem. The court in *Cahoon* states,

> Accordingly, double jeopardy protections *attach only* "when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence." (*State v. Cahoon*, 203 P.3d 957, 959 (Utah, 2009) (citations omitted, emphasis added)).

The ruling in *Oppenheimer* has stood for nearly a century. It has prevailed because it was based on reason, logic and an understanding that the justice system needs a formula of finality. This finality has been ignored in the *Cahoon* decision, and the underpinnings of this decision not only violate the petitioner's constitutional rights, but threaten the justice system in America.

CONCLUSION

This Court should grant the petition for a Writ of Certiorari and reverse the decision of the Utah Supreme Court.

RESPECTFULLY submitted this 8th day of May 2009.

RANDALL W. RICHARDS
Counsel for Petitioner

2009 UT 9

This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT OF UTAH

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State of Utah,

Plaintiff and Petitioner, No. 20070799

v. FILED

Dwight Cahoon, February 10, 2009

Defendant and Respondent.

– – –

First District, Logan Dep't
The Honorable Clint S. Judkins
No. 041100622

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Tony C. Baird, Logan, for plaintiff.
John T. Caine, Randall W. Richards,
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On Certiorari to the Utah Court of Appeals

DURRANT, Associate Chief Justice:

INTRODUCTION

¶1 The State filed two informations against Mr. Dwight Cahoon based on the same criminal acts. In the original information, the State asserted ten

counts of aggravated sexual abuse of a child and ten counts of forcible sexual abuse. When Cahoon moved for dismissal on statute of limitations grounds, the State conceded that the statute had run on the charges in the original information, but the State simultaneously filed an amended information charging Cahoon with ten counts of sexual abuse of a child, a crime for which the State contended the statute of limitations had not run.

¶2 The district court thereafter dismissed the original information, but the court denied Cahoon's motion to dismiss the amended information, rejecting his argument that the charges alleged in the amended information were precluded by the statute of limitations and the double jeopardy clauses of the Utah and United States constitutions.

¶3 Cahoon then entered a conditional guilty plea to two counts in the amended information. The district court sentenced him to two concurrent terms of one to fifteen years, but stayed the sentence pending his appeal. The court of appeals reversed Cahoon's conviction, holding that the amended charges violated his right to be free from double jeopardy. We reverse, concluding that jeopardy had not attached at the time the district court dismissed the original information.

BACKGROUND

¶4 In 2004, Ms. Nancy Lucchetti contacted the Logan City Police Department and alleged acts of

sexual abuse by Cahoon, her brother-in-law, between the years of 1989 and 1992. Lucchetti was twelve years old in 1989. Subsequent to Lucchetti's allegations, Cahoon admitted to police that he had indeed committed acts of sexual abuse against Lucchetti on some fifteen to twenty occasions.

¶5 Shortly after Lucchetti made these allegations, the State charged Cahoon by information with ten counts of aggravated sexual abuse of a child and ten counts of forcible sexual abuse. Cahoon moved to dismiss all of the charges on the ground that the statute of limitations had expired. In response, the State conceded that the statute had run on the original charges. Simultaneously, the State submitted an amended information, charging Cahoon with ten counts of sexual abuse of a child, a crime for which the State contended the statute of limitations had not run. The charges in the amended information were based upon the same conduct that supported the original charges. Subsequently, the trial judge dismissed with prejudice the original charges.

¶6 Cahoon then moved to dismiss the amended charges on the following grounds: the statute of limitations had also run on the amended charges and the amended charges violated Cahoon's right to be free from double jeopardy. The district court ruled against Cahoon on both grounds.

¶7 After the court's ruling, Cahoon entered conditional guilty pleas to two counts in the amended information. The district court then sentenced him to

two concurrent terms of one to fifteen years at the Utah State Prison, but stayed execution of the sentence and granted him a certificate of probable cause.

¶8 Cahoon timely appealed, raising double jeopardy and due process claims based on the United States and Utah constitutions.[1] The court of appeals held that the amended charges violated Cahoon's federal constitutional right to be free from double jeopardy.[2] Specifically, the court of appeals held that Cahoon's case was a rare circumstance where a pretrial dismissal was the functional equivalent of an acquittal because it resolved a factual element of the crime-time.[3] To support its holding, the court of appeals relied on *United States v. Oppenheimer,* wherein the United States Supreme Court held that the government could not re-charge an accused with charges identical to those that were dismissed as barred by the statute of limitations.[4] The court of appeals also grounded its holding in Utah statutory

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[1] The court of appeals indicated in its opinion, however, that Cahoon's brief offered "no basis for independent reliance on the state constitution." *State v. Cahoon,* 2007 UT App 269, ¶ 8 n.1, 167 P.3d 533 (internal quotation marks omitted). Accordingly, the court of appeals did not conduct a state constitutional analysis. Before us, Cahoon has not advanced a state constitutional argument, and we, therefore, do not address the issue either.

[2] *Cahoon,* 2007 UT App 269, ¶ 1.

[3] *Id.* ¶¶ 11-12.

[4] *Id.* (discussing *United States v. Oppenheimer,* 242 U.S. 85, 87-88 (1916)).

protections against double jeopardy, which provide that, once acquitted, a defendant cannot be charged again for the same criminal act.[5]

¶9 We granted the State's petition for certiorari to review the court of appeals' decision. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(a) (2008).

STANDARD OF REVIEW

¶10 On certiorari, "[w]e review the court of appeals' decision for correctness and give its conclusions of law no deference."[6]

ANALYSIS

¶11 In this case, the Double Jeopardy Clause of the United States Constitution precludes prosecution based on the amended information only if (1) jeopardy had attached at the time of the pretrial dismissal of the original information[7] and (2) the district court's dismissal of the original information on statute of

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[5] *Id.* ¶ 14 (citing Utah Code Ann. § 76-1-403 (2003)).

[6] *Bluemel v. State*, 2007 UT 90, ¶ 9, 173 P.3d 842 (internal quotation marks omitted).

[7] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) (stating that a threshold consideration to applying double jeopardy protection is a determination of whether "the accused has actually been placed in jeopardy").

limitations grounds functioned as an acquittal.[8] Because we hold that jeopardy had not attached at the time of the pretrial dismissal, we do not reach the question of whether a dismissal of charges as barred by the statute of limitations would function as an acquittal if the determination were made after jeopardy attached.

¶12 The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides in relevant part: "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." "[T]he 'controlling constitutional principle'" underlying the Double Jeopardy Clause is the "prohibition[] against multiple trials."[9] Accordingly, double jeopardy protections attach only "when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence."[10] These two parallel stages in the legal process are the functional equivalent of one another and differ only because the accused may elect either a jury trial or a bench trial. Regardless of the form of the trial, "jeopardy does not

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[8] *Id.* at 571 ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" (alterations in original) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896))).

[9] *Martin Linen Supply Co.*, 430 U.S. at 569 (quoting *United States v. Wilson*, 420 U.S. 332, 346 (1975)).

[10] *Id.* (citing *Illinois v. Somerville*, 410 U.S. 458, 471 (1973)).

attach until a defendant is 'put to trial before the trier of the facts.'"[11]

¶13 A majority of the court of appeals panel reversed the district court's ruling that jeopardy had not attached and held that the State's amended information violated Cahoon's right to be free from double jeopardy.[12] Working under the principle that the Double Jeopardy Clause "'protects against a second prosecution for the same offense after acquittal,'"[13] the majority relied upon *United States v. Oppenheimer*[14] in concluding that Cahoon's case is a "rare case[ ] in which a pretrial decision functions as an acquittal" and bars "further prosecution."[15] Judge Bench,

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[11] *Serfass v. United States*, 420 U.S. 377, 391 (1975) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1970)).

[12] *State v. Cahoon*, 2007 UT App 269, ¶ 15, 167 P.3d 533.

[13] *Id.* ¶ 8 (quoting *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07 (1984)).

[14] 242 U.S. 85 (1916).

[15] *Cahoon*, 2007 UT App 269, ¶ 12. Implicit in the court of appeals' holding is the notion that if a decision functions as an acquittal, then jeopardy necessarily attaches. We disagree. The rule that double jeopardy "protects against a second prosecution for the same offense after acquittal," *Justices of Boston Mun. Court*, 466 U.S. at 306-07, must be read in combination with the rule that the "state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence," *Martin Linen Supply Co.*, 430 U.S. at 569. The logical conclusion of reading these two rules together is that pretrial determinations are not acquittals for purposes of double jeopardy analysis. This conclusion leaves open the question of whether the same determination, if made after a

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dissenting, opined that *Oppenheimer* did not support the position adopted by the majority.[16] He recognized a split among the circuits on the issue,[17] but concluded that the better-reasoned position was that the holding in *Oppenheimer* rested on the principle of collateral estoppel, not double jeopardy.[18] This division among the court of appeals' panel is a reflection of the disagreement between the federal circuits on the question of whether jeopardy may attach at the time of a pretrial dismissal.[19] Reviewing the text of *Oppenheimer* and subsequent Supreme Court precedent, we conclude, as did Judge Bench, that *Oppenheimer* was, in fact, based on principles of collateral

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trial commenced, could function as an acquittal. We do not reach this question.

[16] *Id.* ¶ 18 (Bench, J., dissenting).

[17] *Id. Compare United States v. Hill*, 473 F.2d 759, 762 (9th Cir. 1972) (holding that a pretrial dismissal on statute of limitations grounds bars a subsequent prosecution of the same criminal activity) *with Paradise v. CCI Warden*, 136 F.3d 331, 337 (2d Cir. 1998) (suggesting that *Oppenheimer* does not bar subsequent charges after a dismissal on statute of limitations grounds provided that the subsequent charges are different from the original charges).

[18] *Cahoon*, 2007 UT App 269, ¶ 18.

[19] *See Rodrigues v. Hawaii*, 469 U.S. 1078, 1080-81 (1984) (Brennan, J., dissenting from the denial of the petition for writ of certiorari) ("[W]hether jeopardy attaches to an acquittal . . . that occurred prior to the empaneling of a jury or the calling of the first witness" is an issue that "has engendered division amongst the commentators as well as a conflict among the Courts of Appeals.").

estoppel, not double jeopardy, and that jeopardy does not attach at pretrial proceedings.

¶14 *Oppenheimer* is a 1916 United States Supreme Court case wherein the government brought charges against an accused that were identical to charges a trial court had previously dismissed on statute of limitations grounds.[20] Oppenheimer challenged the second prosecution on the ground that the offense had already been dismissed for failure to prosecute within the statute of limitations.[21] The trial court granted Oppenheimer's motion.[22] On appeal, the government argued that the trial court erred in quashing the second indictment because the trial court applied "res judicata," a doctrine that "does not exist for criminal cases except in the modified form of the Fifth Amendment."[23] The United States Supreme

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[20] 242 U.S. at 85-86.

[21] *Id.* at 86.

[22] *Id.*

[23] *Id.* at 87. "'Res judicata' is the term traditionally used to describe two discrete effects: . . . claim preclusion . . . and . . . issue preclusion, long called 'collateral estoppel.'" *Baker by Thomas v. GMC,* 522 U.S. 222, 233 n.5 (1998). The Court in *Oppenheimer* wrote in terms of "res judicata." 242 U.S. at 87. Courts interpreting *Oppenheimer* used the term "collateral estoppel" in conducting their analysis. *See, e.g., Ashe v. Swenson,* 397 U.S. 436, 464 (1970) (Burger, J., dissenting) ("The majority rests its holding in part on a series of cases beginning with *United States v. Oppenheimer,* . . . which did not involve constitutional double jeopardy but applied *collateral estoppel* as developed in civil litigation to federal criminal prosecutions as a matter of this Court's supervisory power over the federal court

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Court held that a criminal defendant is protected by both collateral estoppel and double jeopardy:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.[24]

Having established that a criminal defendant is protected by collateral estoppel, the Court then held that collateral estoppel protected Oppenheimer from the prosecution of charges *identical* to those originally barred by a finding that they violated the statute of limitations:

> [A] judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law

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system." (emphasis added)); *United States v. Dionisio,* 503 F.3d 78, 85 (2d Cir. 2007); *United States v. Keller,* 624 F.2d 1154, 1157 (3d Cir. 1980). In our analysis in this case, we will use the term "collateral estoppel.".

Collateral estoppel "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Oman v. Davis Sch. Dist.,* 2008 UT 70, ¶ 28, 194 P.3d 956 (citation and internal quotation marks omitted). The Fifth Amendment Double Jeopardy Clause prevents, in relevant part, "a second prosecution for the same offense after acquittal." *Justices of Boston Mun. Court,* 466 U.S. at 306. Therefore, in the criminal context, collateral estoppel prevents subsequent prosecution with charges that were previously dismissed, and double jeopardy prevents subsequent prosecution with any charges of the same criminal activity after the defendant has been acquitted.

[24] *Oppenheimer,* 242 U.S. at 87.

> and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits, . . . and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. . . . "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings."[25]

Thus, the Court in *Oppenheimer* discussed both double jeopardy and collateral estoppel but held that collateral estoppel, not double jeopardy, barred the government from bringing identical charges against a defendant after a pretrial dismissal. Accordingly, we conclude that the court of appeals' interpretation of *Oppenheimer* – that double jeopardy bars subsequent prosecution after charges are dismissed for violating the statute of limitations – is incorrect.[26] Rather, we determine that *Oppenheimer* stands for the principle that collateral estoppel prevents the government from bringing *identical* charges against a defendant if the

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[25] *Id.* at 87-88 (alterations in original) (quoting Hawkins, J., in *The Queen v. Miles* (1890), 24 Q.B.D. 423, 431).

[26] *Cahoon*, 2007 UT App 269, ¶ 12.

original charges were dismissed for violating the statute of limitations.[27]

¶15 Subsequent United States Supreme Court precedent supports our reading of *Oppenheimer.* In *Ashe v. Swenson,* the Court stated, "Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer.*"[28] Further, the Court has repeatedly articulated that double jeopardy does not attach until a trial begins.[29] Therefore, a criminal defendant who has not yet been on trial is protected against a subsequent prosecution by collateral estoppel, not double jeopardy.

¶16 Utah's statutory double jeopardy protection, likewise, does not attach at pretrial proceedings. Under section 76-1-403(1)(b)(i) of the Utah Code, a criminal defendant is protected from subsequent prosecutions for the same criminal act after acquittal. Section 76-1-403(2) states that an acquittal occurs if

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[27] *See Oppenheimer,* 242 U.S. at 87-88.

[28] 397 U.S. at 443.

[29] *See, e.g., Schiro v. Farley,* 510 U.S. 222, 230 (1994); *Martin Linen Supply Co.,* 430 U.S. at 569; *United States v. Wilson,* 420 U.S. 332, 336 (1975); *Serfass v. United States,* 420 U.S. 377, 388 (1975); *see also Rodrigues v. Hawaii,* 469 U.S. 1078, 1081 (1984) (Brennan, J., dissenting from the denial of the petition for writ of certiorari) (citing 1 W. LaFave & J. Israel, *Criminal Procedure* § 24.3, pp. 82-83 (1984) for the proposition that jeopardy does not attach to pretrial decisions).

the prosecution "resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence *to warrant conviction.*" (Emphasis added.) A pretrial determination of the sufficiency of the evidence resolves the question of whether the defendant may be bound over for trial, not whether the defendant may be convicted. Only a trial carries the jeopardy of a conviction by the trier of fact; therefore, only at a trial does Utah's statutory double jeopardy protection attach.

¶17 Accordingly, we hold that, because the State brought different charges against Cahoon in the amended information, neither *Oppenheimer* nor the doctrine of collateral estoppel applies in this case. Further, Cahoon's double jeopardy protections do not bar the counts in the amended information because jeopardy does not attach prior to trial.

CONCLUSION

¶18 We reverse the court of appeals' decision and remand this case to the district court for further proceedings consistent with this opinion. Because we hold that jeopardy had not attached at the time of the pretrial dismissal, we do not reach the question of whether a dismissal on double jeopardy grounds may function as an acquittal after jeopardy has attached. Reversed.

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¶19 Chief Justice Durham, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Durrant's opinion.

This opinion is subject to revision before publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

State of Utah, Plaintiff and Appellee, v. Dwight Cahoon, Defendant and Appellant.	OPINION (For Official Publication) Case No. 20060362-CA FILED (August 2, 2007) 2007 UT App 269

First District, Logan Department, 041100622
The Honorable Clint S. Judkins

Attorneys: John T. Caine, Ogden, for Appellant
Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Appellee

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Before Judges Bench, Billings, and Davis.

DAVIS, Judge:

¶1 Defendant Dwight Cahoon appeals the denial of his motion to dismiss, arguing that any prosecution for the amended charges against him would violate his constitutional right to due process and protection from double jeopardy. We reverse.

BACKGROUND

¶2 On August 12, 2004, the State filed an information against Defendant, charging him with ten counts of aggravated sexual abuse of a child, a first degree felony, for events occurring before the victim turned fourteen years old, *see* Utah Code Ann. § 76-5-404.1(4) (2003), and ten counts of forcible sexual abuse, a second degree felony, for events occurring after the victim was fourteen, *see id.* § 76-5-404 (2003). In mid-January 2005, Defendant filed his Motion to Dismiss Based Upon Statute of Limitations. In the supporting memorandum, Defendant argued that the applicable four-year statute of limitations for all the charged offenses had run.

¶3 The State replied on January 28, 2005, opposing the motion to dismiss. The State agreed that the original twenty charges were time-barred by the statute of limitations, but also argued that based on the same alleged acts, Defendant could instead be charged with ten counts of sexual abuse of a child, a second degree felony, *see id.* § 76-5-404.1, which were lesser included offenses of the ten counts of aggravated sexual abuse of a child, and were offenses for which the statute of limitations had not yet run. The State included, as an attachment, a proposed Amended Information charging Defendant with those ten counts.

¶4 On February 23, 2005, the trial court conducted a telephone conference regarding the motion to dismiss. The State again acknowledged that the original

twenty counts were barred by the statute of limitations, but also mentioned that it had filed the Amended Information charging ten counts of sexual abuse of a child. Defendant requested, and the court granted, additional time to file pleadings challenging the filing of the Amended Information. Also during this telephone conversation, the court apparently dismissed the original twenty counts with prejudice, although such was not specifically stated in the accompanying minute entry.

¶5 Defendant then filed his Motion to Dismiss Amended Information, arguing that the doctrines of due process and double jeopardy precluded the ten counts of sexual abuse of a child because the ten previous counts of aggravated sexual abuse of a child had already been dismissed. In August 2005, oral argument was held, at which the trial court determined that double jeopardy did not apply and that due process was not violated by the charges in the Amended Information. At this hearing, the trial court also instructed Defendant to prepare an order memorializing the February 23 phone conference. The court signed this order dismissing the original twenty counts with prejudice on September 1, 2005.

¶6 Plea negotiations followed thereafter, and Defendant pleaded guilty to two of the ten counts of sexual abuse of a child pursuant to *State v. Sery,* 758 P.2d 935, 938-39 (Utah Ct. App. 1988), thus preserving his right to appeal the trial court's decision on his constitutional arguments. Defendant now appeals.

ISSUES AND STANDARD OF REVIEW

¶7 Defendant raises arguments of due process and double jeopardy under both the federal and state constitutions. "[C]onstitutional arguments regarding double jeopardy and due process present questions of law," *State v. One 1980 Cadillac,* 2001 UT 26, ¶8, 21 P.3d 212, which we review for correctness.

ANALYSIS

¶8 The United States Constitution protects a defendant from being twice placed in jeopardy for the same offense. *See* U.S. Const. amend. V.[1] The Double Jeopardy Clause embodies three separate guarantees: "It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *Justices of Boston Mun. Court v. Lydon,* 466 U.S. 294, 306-07 (1984). Defendant argues that the trial court's dismissal with prejudice of the ten counts of aggravated sexual abuse of a child functions as an acquittal on those counts and, therefore, bars subsequent prosecution for the ten

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[1] "[Defendant's] brief refers to both the state and federal constitutional provisions [regarding double jeopardy]. His brief, however, offers no basis for independent reliance on the state constitution. Therefore, we address only the federal provision." *State v. Jensen,* 818 P.2d 551, 552 n.2 (Utah 1991); *see also State v. Rynhart,* 2005 UT 84, ¶12, 125 P.3d 938. We do not, however, intend to imply that the result would be different under the corresponding state provision.

counts of sexual abuse of a child, which are lesser included offenses arising from the same acts for which Defendant was originally charged. We agree.

¶9 The United States Supreme Court has stressed that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (citations omitted); *see also State v. Musselman*, 667 P.2d 1061, 1064 (Utah 1983) ("A ruling that constitutes a factual resolution in favor of the defendant on one or more of the elements of the offense charged is an acquittal."). Thus, whether a trial court's ruling is characterized as a dismissal with or without prejudice, the ruling is an acquittal so long as it resolves at least one element of the offense charged in favor of the defendant.

¶10 The Utah Supreme Court has also instructed that "[b]ecause a defense based on the . . . statute of limitations . . . is valid even when the prosecution can prove all statutory elements of the crime, the prosecution is required to prove time as an additional aspect or element of its case." *State v. Fulton*, 742 P.2d 1208, 1213 (Utah 1987). Here, because Defendant raised a statute of limitations defense, time became an element of the offense, and the trial court resolved this factual element in favor of Defendant – i.e., determining that the State could not prove that the ten counts of aggravated sexual abuse of a child

occurred at a time prior to the running of the statute of limitations. Thus, the trial court's dismissal with prejudice resolved an element of the offense in favor of Defendant, and such ruling is an acquittal of the ten counts of aggravated sexual abuse of a child, regardless of the actual title placed on the ruling.

¶11 We next address whether such an acquittal bars further prosecution of the crime. The Supreme Court case *United States v. Oppenheimer,* 242 U.S. 85 (1916), is instructive. In that case, an indictment was dismissed on the ground that the charge was barred by the statute of limitations. *See id.* at 86. The Supreme Court determined that such an acquittal barred further prosecution, reasoning that

> [i]t cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled. . . .

Id. at 87. Thus, although "there had been no trial at all in the conventional sense, but merely a motion to dismiss, apparently without the reception of any evidence," the acquittal in *Oppenheimer* still barred future prosecution for the same offense. *United States v. Hill,* 473 F.2d 759, 762 (9th Cir. 1972).

¶12 Although we readily acknowledge that many, if not most, decisions prior to trial do not have double

jeopardy implications,[2] we agree with the *Oppenheimer* Court that in the rare cases in which a pretrial

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[2] The State's argument regarding the point at which jeopardy traditionally attaches is well taken. *See generally Bernat v. Allphin*, 2005 UT 1, ¶10, 106 P.3d 707 ("In jury trials, jeopardy attaches after a jury has been selected and sworn. In bench trials, jeopardy attaches after the first witness is sworn and the court begins to hear evidence." (citations omitted)). We also recognize that the United States Supreme Court has not specifically addressed whether jeopardy attaches to this type of pretrial acquittal, and that this void "has engendered division amongst the commentators, as well as a conflict among the Courts of Appeals." *Rodrigues v. Hawaii*, 469 U.S. 1078, 1080-81 (1984) (Brennan, J., dissenting) (footnote omitted), *denying cert. to* 679 P.2d 615 (Haw. 1984). The Supreme Court has, however, addressed the great weight given to acquittals in general:

> An acquittal is accorded special weight. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal, for the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair. The law attaches particular significance to an acquittal.

United States v. Difrancesco, 449 U.S. 117, 129 (1980) (quotations and citations omitted). And we agree with Justices Brennan and Marshall that such principles "strongly suggest that jeopardy does attach to [these pretrial] acquittals and that it is of no consequence that the defendant's acquittal occurred before the formal commencement of trial." *Rodrigues*, 469 U.S. at 1080 (Brennan, J., dissenting). Moreover, it is significant that a pretrial acquittal based upon the final resolution of a fact issue in the defendant's favor is the functional equivalent of having had a trial and having been acquitted.

decision functions as an acquittal, further prosecution is barred.

> Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution.

Oppenheimer, 242 U.S. at 87-88 (citation omitted). Thus, the dispositive question is whether an acquittal has occurred, that is, whether "the judge ha[s] rendered a decision for the defendant 'as a matter of substantive law.'" *Hill,* 473 F.2d at 762. The ruling here was a decision of substantive law, regardless of the point in the proceeding at which it was made. Thus, the acquittal on the originally filed ten counts of aggravated sexual abuse of a child barred later prosecution of the subsequently filed ten counts of the lesser included offense, sexual abuse of a child. *See generally Brown v. Ohio,* 432 U.S. 161, 169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

¶13 We recognize that "[i]t may be that in *Oppenheimer* the Court was applying *res judicata* or

collateral estoppel rather than, or as much as, double jeopardy, although that is by no means clear." *Hill,* 473 F.2d at 762. But regardless of the theory relied upon, the Supreme Court determined that further prosecution was barred after a pretrial decision for the defendant as a matter of substantive law. *See Oppenheimer,* 242 U.S. at 87-88. Further, even without reliance on *Oppenheimer,* or on any constitutional double jeopardy principles for that matter, subsequent prosecution after a pretrial acquittal is also clearly barred under the provisions of the Utah Criminal Code that are discussed below, which provisions are consistent with *Oppenheimer.*

¶14 Utah Code section 76-1-402(1) provides that when a defendant's act "establish[es] offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal . . . under any such provision bars a prosecution under any other such provision." Utah Code Ann. § 76-1-402(1) (2003). And section 76-1-402(3) specifies that "[a] defendant . . . may not be convicted of both the offense charged and the included offense." *Id.* § 76-1-402(3). Further, section 76-1-403(1) provides that when a defendant has been prosecuted for one offense, a later prosecution for a lesser included offense "is barred if . . . [t]he former prosecution . . . resulted in acquittal." *Id.* § 76-1-403(1) (2003). Thus, an acquittal on the greater offense bars prosecution for the lesser included offense. And finally, consistent with the federal authorities discussed above, under the

Utah Criminal Code, a determination that an element of the offense cannot be proven is an acquittal. *See id.* § 76-1-403(2) ("There is an acquittal if the prosecution resulted in . . . a determination that there was insufficient evidence to warrant conviction."). Therefore, the trial court's dismissal with prejudice of the initial ten counts of aggravated sexual abuse of a child was an acquittal, and as such, it barred subsequent prosecution for lesser included offenses arising from the same acts.

CONCLUSION

¶15 The trial court's dismissal with prejudice of the original charges as time-barred by the statute of limitations was a resolution of a factual element of the offense and was a decision for Defendant as a matter of substantive law. Therefore, this decision functions as an acquittal on those charges and bars future prosecution for those charges, including prosecution of the charges of the lesser included offense arising from the same set of facts. Accordingly, we reverse the trial court's denial of Defendant's Motion to Dismiss Amended Information, and we remand to the trial court to dismiss the Amended Information and this case.[3]

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[3] Because we determine that the constitutional protection against double jeopardy and Utah statutory law bar prosecution of the charges contained in the Amended Information, we do not reach Defendant's due process argument, grounded in *State v.*

(Continued on following page)

/s/ James Z. Davis
James Z. Davis, Judge

¶16 I CONCUR:

/s/ Judith M. Billings
Judith M. Billings, Judge

BENCH, Presiding Judge (dissenting):

¶17 I respectfully dissent. Neither *United States v. Oppenheimer,* 242 U.S. 85 (1916), nor Utah statutory law compels the result reached here by the majority.

¶18 My colleagues have failed to cite even one case decided in the ninety-one years since *Oppenheimer* that applies *Oppenheimer* in the way that they do. The majority recognizes that the dearth of case law to support its reading of *Oppenheimer* is problematic. While relying on *United States v. Hill,* 473 F.2d 759 (9th Cir. 1972), one of the only cases cited to in support of its position, the majority acknowledges the unclear legal reasoning in *Oppenheimer. See id.* at 762 (stating that it is not clear whether *Oppenheimer* is based on res judicata or double jeopardy). There is other case law, most notably *Paradise v.*

Brickey, 714 P.2d 644 (Utah 1986), or his contention that the sexual abuse of a child charges are also time-barred.

CCI Warden, 136 F.3d 331 (2nd Cir. 1998), suggesting that *Oppenheimer* should not be a bar here. *See id.* at 337. In *Paradise,* the Second Circuit affirmed the trial court's decision to permit the State to prosecute the defendant for capital murder after the original charges for felony murder were dismissed because the applicable statute of limitations had run. *See id.* at 333-34. In addressing the "due process 'overtones' in Justice Holmes' Oppenheimer opinion," the Second Circuit stated that *Oppenheimer* did not apply because the State was seeking for the first time to litigate the defendant's guilt for, or innocence of, the new crime charged and was not looking for a second chance to proceed on the original charges. *See id.* at 337.

¶19 The majority also relies on Utah Code section 76-1-403 in deciding that the State should be barred from prosecuting Defendant for sexual abuse of a child based on the same facts as the dismissed aggravated charges. Section 76-1-403(1) outlines the circumstances whereby a defendant, who "has been prosecuted for one or more offenses arising out of a single criminal episode," may not be subsequently prosecuted "for the same or a different offense arising out of the same criminal episode." Utah Code Ann. § 76-1-403(1) (2003). To be barred, a subsequent prosecution must be "for an offense that was or should have been tried . . . in the former prosecution," and the former prosecution:

> (i) resulted in acquittal; or
>
> (ii) resulted in conviction; or
>
> (iii) was improperly terminated; or
>
> (iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

Id. § 76-1-403(1)(a)-(b).

¶20 In the present case, the majority has equated the dismissal of the former prosecution on statute of limitations grounds to an acquittal, thereby barring subsequent prosecution of Defendant for any crimes arising out of the same criminal episode. However, the dismissal here is not in line with the statute's definition of an acquittal: "There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction." *Id.* § 76-1-403(2). In dismissing the aggravated charges, the trial court did not make a determination of guilt or innocence and did not conclude that the evidence was insufficient. The trial court merely responded to a pretrial concession that the applicable statute of limitations had run on the aggravated sexual abuse charges. Such court action does not amount to an acquittal under section 76-1-403(1)(b)(i).

¶21 The dismissal therefore falls under the type of court action described in section 76-1-403(1)(b)(iv) because the prosecution "was terminated by a final order or judgment for the defendant." *Id.* § 76-1-403(1)(b)(iv). Subpart (b)(iv) prevents subsequent prosecution only when the final order terminating the former prosecution "necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution." *Id.* Here, the State's subsequent prosecution of Defendant does not require proving any fact that would be inconsistent with the trial court's dismissal of the aggravated charges because the statute of limitations on which the dismissal was based does not apply to the crime of sexual abuse of a child.

¶22 The Utah Supreme Court has previously acknowledged the existence of the precise problem presented in the instant case: whether a defendant may be prosecuted for sexual abuse of a child after charges of aggravated sexual abuse of a child have been dismissed for falling outside the applicable statute of limitations. *See State v. Lusk,* 2001 UT 102, ¶¶32-33, 37 P.3d 1103. The supreme court did not decide the issue in that case because it was "beyond the scope of review," but the issue is squarely presented in the instant appeal. *Id.* at ¶32.

¶23 Defendant's guilt or innocence relating to the charges of sexual abuse of a child has not been previously adjudicated and the applicable Utah statute does not bar the proposed subsequent prosecution

because the statute of limitations does not apply to the newly charged crimes. I therefore cannot agree to reverse on grounds that Defendant has previously been acquitted of the crimes charged in the Amended Information.

/s/ Russell W. Bench
Russell W. Bench,
Presiding Judge

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IN THE FIRST JUDICIAL DISTRICT COURT
OF CACHE COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DWIGHT CAHOON, Defendant.	ORDER ON DEFENDANT'S MOTION TO DISMISS AMENDED INFORMATION Case No. 041100622 Judge Clint S. Judkins

THIS MATTER came before the Court upon the Defendant's Motion to Dismiss Amended Information filed on April 1, 2005. The State responded to the Defendant's motion by way of Memorandum in Opposition to Defendant's Motion to Dismiss Amended Information filed on April 14, 2005. Oral argument was heard on the matter on August 3, 2005.

In the Defendant's Memorandum in Support of Motion to Dismiss Amended Information, the Defendant argued that the ten (10) counts of Sexual Abuse

of a Child in the Amended Information, each a second degree felony under Utah Code Ann. § 76-5-404.1(2), should be dismissed because the statute of limitations ran before the charges were filed on August 12, 2005. In making this argument, the Defendant asked the Court to apply the statute of limitations that was actually in effect in the summer of 1989 and 1990 (the time the sexual abuse occurred). This statute required that prosecution be commenced within one year after the crime was reported to law enforcement but, in any event, no longer than eight years after the actual event took place. Under this statute, he argued, the State needed to file the present charges of the Amended Information by the summer of 1998; because the State did not, the charges are time barred.

The State responded by arguing that the Defendant erred in applying the eight-year statute of limitations to the charges of Sexual Abuse of Child contained in the Amended Information. Effective in 1991, before the expiration of the eight-year limitations period as it would be applied to the present case, the limitations period for the crime of Sexual Abuse of a Child was extended to permit prosecution within four years after a report to law enforcement with no outside time limit.

After considering the briefs and hearing oral argument on the issue, the Court found that the statute of limitations had not run on the ten (10) counts of Sexual Abuse of a Child in the Amended Information before they were filed. Applying the

rationale of *State v. Lusk,* 37 P.3d 1103 (Utah 2001), the Court found that because the legislature amended the applicable statute in 1991, before the time ran on the present charges, the limitations period was extended and the present charges could be brought any time within four years of the report to law enforcement. In this case, the victim reported the sexual abuse to law enforcement on May 14, 2004. The State filed the original information on August 11, 2004 and the Amended Information on January 28, 2005.

In addition to arguing about the statute of limitations, the Defendant also argued that the ten (10) counts of Sexual Abuse of a Child in the Amended Information, each a second degree felony under Utah Code Ann. § 76-5-404.1(2), should be dismissed because the charges violate the Defendant's right against being twice prosecuted for the same offense in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article One Section Seven of the Utah Constitution. This, he claims, is so under the following rationale.

(1) The un-controverted facts of this case are that the Defendant fondled the vagina and breasts of the female child victim in this case on at least five (5) occasions and while he occupied a position of special trust (brother-in-law).

(2) This conduct meets the elements of Aggravated Sexual Abuse of a Child, a first degree

felony, under Utah Code Ann. § 76-5-404.1(4)(g) and (h).

(3) Under the facts of this case, the statute of limitations for Aggravated Sexual Abuse of a Child, a first degree felony, has run and prosecution for this particular offense is time barred.

(4) Sexual Abuse of a Child, a second degree felony, is a lesser-included offense of Aggravated Sexual Abuse of a Child, a first degree felony.

(5) The Defendant cannot be prosecuted for the lesser-included offense if, in fact, his conduct meets the elements of the greater offense and the statute of limitations on the greater offense has run. To allow such would violate substantive due process and double jeopardy under *State v. Lusk,* 37 P.3d 1103 (Utah 2001).

The State argued that the Defendant provided no authority, persuasive or controlling, that supported his argument. The State's position was that the statute of limitation runs with the specific crime, not the particular facts of the case. Even though the statute limitations may have run on a greater offense, the State may, as part of its constitutionally protected executive authority, choose to prosecute an offender with a lesser-included offense, the statute of limitations which has not run, if the facts and circumstances of a particular case warrant such a decision.

After considering the briefs and hearing oral argument on the issue, the Court found that charging

the Defendant with ten (10) counts of Sexual Abuse of a Child in the Amended Information, each a second degree felony under Utah Code Ann. § 76-5-404.1(2), did not violate the Defendant's right against being twice prosecuted for the same offense in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article One Section Seven of the Utah Constitution. Further, the Court found, *Lusk,* does not support the position argued by the Defendant.

BASED UPON THE AFORESAID, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

The Defendant's Motion to Dismiss Amended Information is denied.

DATED this 1 day of Sept, 2005.

BY THE COURT:

/s/ Clint S. Judkins [SEAL]
District Court Judge

APPROVED AS TO FORM:

/s/ John T. Caine
John T. Caine
Attorney for the Defendant

[Certificate Of Delivery Omitted In Printing]

IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff,	)	
	)	Case No. 041100622
vs.	)	Transcript of Videotape.
DWIGHT CAHOON,	)	
Defendant.	)	

Transcript of Motion to Dismiss Hearing.
Honorable Clint S. Judkins presiding.
First District Court Courthouse
Logan, Utah
August 3, 2005 – 10:10 a.m.

* * *

APPEARANCES:

For the Plaintiff: TONY C. BAIRD
Deputy County Attorney

For the Defendant: JOHN T. CAINE
Attorney at Law

RODNEY M. FELSHAW
Registered Professional Reporter
First District Court
P. O. Box 873
Brigham City, UT 84302-0873

[2] THE COURT: Take the case of State of Utah versus Dwight Arthur Cahoon. This is the time set for oral argument on a motion to dismiss. Mr. Caine, the court will hear from you.

MR. CAINE: Thank you. First, might I state that it's nice to see the court back.

THE COURT: Mr. Caine, it's nice that you can see me.

MR. CAINE: I'm glad you're feeling better. I'm told by counsel here that you haven't missed a beat. That's good for all of us.

THE COURT: Thank you.

MR. CAINE: May it please the court and counsel, we are here today for oral argument on a motion that was filed by myself on behalf of Mr. Cahoon back on or about the 15th or so of April. This is a second motion to dismiss the information in this case.

I'll be very brief to bring the court up to speed, because I know you were, but you'll recall that in January we filed a motion to dismiss when we had an information that consisted of 20 counts. The first ten were aggravated sexual abuse of a child; and then the second ten were forcible sexual abuse. We filed a motion on that particular information alleging that both sections, essentially, the aggravated sexual abuse charges and the forcible sexual abuse [3] charges, violated the applicable statute of limitations and should be dismissed. The foundation for that was the case of State versus Lusk.

The state, frankly, reviewed that and, to their credit, acknowledged and agreed, and the court will recall that we had a phone conference where the state

agreed that the defense was correct. And the court, then, based upon that, dismissed that information.

A subsequent information was filed with ten counts of sexual abuse of a child, second degree felonies. And that is the particular subject of the new motion that was filed in April, although I think there are some similar issues.

I won't presume to talk to the court about the Lusk case because this court probably knows more about that case than any of us since it had its origins in this court. But clearly at the appellate level Lusk is a major determination by the Utah Supreme Court concerning certain issues about the statute of limitations.

In this second motion I want to begin by quoting some language that is contained on page four of our memorandum that I think is important at the outset as we look at this second filing. That is, the court was talking in there about what the effect of a dismissal was and those kinds of things. And with this following language it was talking about whether or not the statute of limitations enacted subsequently could [4] be applied retroactively and this sort of thing. The court said this: "Hence, we hold that once the statute of limitations has run on a crime committed precluding prosecution of that crime it is forever barred. And a defendant's right to rely on that limitation defense cannot be eliminated by subsequent legislative intent."

The importance of that language at the outset of our position is that it is – in other words, if a prosecution violates the statute of limitations and therefore on a motion to dismiss is dismissed, it is forever barred. That acts as a dismissal with prejudice. If you can't bring it up again, it's dismissed with prejudice. That's what I think the concept of forever barred means. It doesn't make any sense if it means anything else. It isn't a dismissal without prejudice if you can figure out some other way. If the statute of limitations applies and bars the prosecution, it's with prejudice.

That becomes important in this case because what in effect happened here is that once the state conceded that their aggravated sexual abuse of a child charges were violative of the statute of limitations under the Lusk case, they then turned around and filed the same charges. In other words, it's the same events, the same time frame. This is back in the late eighties and early nineties. But simply filed it as sexual abuse of a child instead of aggravated [5] sexual abuse of a child. That's all they did. That was the only change that was made. The forcible sexual abuse charges that took place later they didn't do anything further with.

Here's the problem with that analysis. We really raise two issues here and I'm going to go to the second one because I think it has the most direct application. My view is that that's double jeopardy. When that charge initially filed as an aggravated sexual abuse of a child, which the state chose to file,

and it's important to understand that. That wasn't filed back before Lusk. That was filed in August of 2004. They filed that charge presumably knowing about the Lusk case, particularly as it came out of this district. They chose to do it anyway. And then essentially they said, oops, that's right, it is barred.

And the Lusk case was a case that dealt specifically with aggravated sexual abuse. That was the core of the Lusk case. They knew about that, chose to file that case anyway. And then, when the case was dismissed, as it should have been, they said, well, time out. Let's just go back and create the legal fiction that we can charge the same thing, just take out the word aggravated. It's the same case, the same set of facts, we just won't push the fact that one of the aggravating circumstances existed, to whit that there was more than one event; and secondly that the person involved in this case, the defendant, may have been in a position of [6] special trust. Those were the factors under the aggravating portion of the statute that made it aggravating. But the events themselves are identical. It's the same case.

Now, what the state chose to argue, and I found it interesting, is that, well, we have prosecutorial discretion. Therefore, we can do anything we want. If we choose to charge it that way, you know, that's our prerogative. Well, I don't have any problem with prosecutorial discretion until it violates the constitution or violates due process under the Fifth and Fourteenth amendment and article – article one, section seven of the Utah constitution. Then they don't have

prosecutorial discretion. And they clearly don't have it if jeopardy is attached in a case.

Our position is that once this case, the initial charges, were dismissed with prejudice, and that's what they were, it's the same case. They can't come back and reprosecute it.

It's interesting to me that the state said on page four of their argument, in accusing the defense in this case of if you don't have the law then use the facts. If you don't have the facts, pound the law. If neither, pound the podium. Well, here's the podium. I guess my retort to that would be, given the state's position, if you know you're wrong you simply ignore the argument altogether. You won't find anything in the state's opposing memorandum addressing the issue of jeopardy or whether or not this prosecution is [7] barred in that respect because they simply say, well, that's covered by prosecutorial discretion in the charging process. I don't agree with that. I think this case clearly comes down on all fours that jeopardy is attached and that they can't now come back and do the same thing.

Now, there is a secondary issue in this case and that is whether or not what statute of limitations period actually is in effect here. And there's an argument on that. I'll concede that that issue was not resolved by Lusk. In fact, Lusk specifically says we won't get to the argument of the sexual abuse of a child circumstance because it wasn't before us and so we didn't decide it. Nobody has decided it. And the

state and the defense in that case have different positions on what applies and that sort of thing. And the appellate courts have not yet told us what it is.

It's my position, under that argument, that in effect it would be barred under that provision as well. But I don't think we have to get to that argument in this case. Once we have a dismissal with prejudice of facts which are essentially – it's the same effect in the criminal law, in my view, as if the state put on their evidence in a trial and I, at the end of the state's case, make a motion to dismiss and you grant that on the basis that there's simply not enough to go to a jury, that dismissal is done. That doesn't mean that the state can come back four months later and say [8] we found another witness so we might be able to survive the motion now. We're through. A dismissal with prejudice on a time barred limitations circumstance, and that's what this is, is done. Jeopardy has attached on that case and it is the same case.

To say, well, no, it isn't because we're only charging sexual abuse of a child instead of aggravated is disingenuous. The facts are the same. The state is simply saying, all right, we can't charge is as aggravated, a first degree, so we'll charge is as a second and we just won't talk about the fact that there's more than one incident or that this might be a position of special trust. It makes no sense.

I'm sorry that the victims in this case may feel that they have been abused by the system. The state makes an argument in here, you know, that a crime

was committed and something has to be done, but we have rules. And this is an individual who waited until 2004 to start this ball rolling. And the reality is, Your Honor, it came about in a domestic case. There'd been no approach to law enforcement or the county attorney's office back in 1993, '94, '95, all of these times. And this was not a young child. This person turned 18, I believe, in 1981 or sometime – '91, excuse me.

And so what happens is, in an effort to assist the victim's sister in a divorce case against my client, an [9] affidavit is filed and all of a sudden, now, the issue pops up and suddenly we have a criminal prosecution. I could spend all day talking about what I think about that maneuver. But the reality is if in fact a decision dismissing this case, as I think it should be by this court today, doesn't sit well with the victim and the victim's family, I'm sorry about that. But we have rules, we have a law, we have certain things that we live by as we proceed with cases in the system. And due process is not something to wink at. The Fifth amendment, the Fourteenth amendment, article seven, section – article one, section seven, excuse me, of the Utah constitution are not just pieces of paper.

When we have a case like this where the state chose and used their – and I guess this is my concluding thought. The state used their prosecutorial discretion in this case, if you will, to charge in August of 2004 aggravated sexual abuse of a child. They could have read the Lusk case. They could have said if we charge that we're in trouble so we'll charge it

right out of the chute as sexual abuse of a child. They exercised their prosecutorial discretion to charge the other and it was tossed on a statute of limitations argument and dismissed with prejudice. It was their discretion. They exercised it. The case is over and in our view this case should then be dismissed and the matter terminated. Thank you.

[10] THE COURT: Thank you. Mr. Caine, Mr. Baird, your response.

MR. BAIRD: Thank you, Your Honor. I complement counsel on his impassioned argument, but I think that one of the problems that we have in this case is that the defense is trying to infuse emotion into this case rather than really the law.

He talks about – the defense argues that the state hasn't responded to the double jeopardy argument, but the problem is, and the state noted this in its memorandum, counsel hasn't cited one case that supports the argument that he makes. That somehow, because it's a lesser included, that prejudice attaches to the whole incident. Not just to crimes, not just to the crime itself, but to the whole incident.

But there's no case law cited by counsel, so it's difficult to respond to an argument when there's nothing provided to support it other than just referring to the constitution. And I respect the constitution as much as anybody in this room and it's nice to refer to it, but show me some authority, something from an appellate court that applies that, rather than just

referring to the constitutional phrasing and just appealing to emotion.

Let me address this quickly, because I think it's irrelevant, but what motive the victim may have had in [11] waiting, whether it was sinister or whether it was because, as the state suggests, she, had a tough time dealing with the sexual abuse and she felt that the defendant was going to handle it. He didn't handle it the way she thought it should be handled and it wasn't handled appropriately and he didn't get the counseling that he needed and didn't take care of the problem. If she waited for that reason, which would be an understandable reason, it doesn't really matter. It doesn't matter why she waited.

I don't think that motive on the victim's part matters at all. It has nothing to do with the statute of limitations. It doesn't say in the statute of limitations statute that, you know, if the victim has a motive to wait because she's sinister or wants to wait several years and then report the charges so it puts the defendant in a difficult position, I mean, the statute doesn't say anything about that, Your Honor. So I think the motive argument is just a mere attempt to infuse emotion into the court's decision. I think it's improper.

Counsel argues that under Lusk the court, when it says that the crime is forever barred, that that applies to the greater crime and any lesser includeds, if in fact it's a lesser included. Well, I think that defense counsel is confusing the court's decision. I think

it's an error to say that it prohibits prosecution of anything coming out of those [12] facts. The statute of limitations, as the state understands it, runs with the crime. It goes with the crime. It doesn't – the statute of limitations doesn't apply to a fact scenario. It applies to the particular crime. If I charged in a fact scenario, for example, a felony DUI, an open container, which would be a class C misdemeanor, there's two different statute of limitations that apply. Let's just say that for some reason the state waits for a year and a half to charge the case. Well, we would be barred from charging the open container because the statute has run. It runs with the crime, not the fact scenario, not the particular incident or episode. I think that's what it appears that counsel is arguing, that it runs with the facts as opposed to the crime.

In this case the state is acknowledging, yeah, given the law, given the decision out of Lusk, pursuing the first degree felony in this case is impossible. It is barred by the statute of limitations. Because the statute of limitations runs with that crime and we acknowledge that it is barred.

However, the state has the discretion and the authority to file whatever may be appropriate for a particular fact circumstance. Whether that's because we feel that because of justice it would be fair to charge a lesser crime or as part of a plea negotiation or for whatever reason, the executive branch has that authority and can exercise that authority and [13] that discretion to file whatever they think is appropriate given the fact circumstances.

Well, in this particular circumstance, because of reasons of the statute of limitations, yeah, were charging a second degree felony. We charged that and acknowledged that in our response in the first motion to dismiss before the dismissal took place. We believe that our amendment was appropriate and should stand.

I disagree with – the state disagrees with the defense on what statute of limitations applies to the second degree felony in this case. If you apply the Lusk rationale and the Lusk holding to the second degree felony, the state believes that the second degree felony was preserved during this time period and would disagree that there's really any question about what statute of limitations applies to the second degree felony. We believe that it has been preserved because of Lusk and its decision.

We ask the court, Your Honor, to deny the defendant's motion to dismiss the amended information in this case. We ask that the case go forward and that hopefully justice will be served. Thank you.

THE COURT: Mr. Caine, you get the last word.

MR. CAINE: Thank you. I'll make a brief response. Your Honor, counsel for the state seems to suggest that because there was no law cited with respect to the double [14] jeopardy argument, that the state can therefore just ignore it. Jeopardy is a legal argument that is raised constitutionally. I call his attention, as I did the court's, to the language in

Lusk. That's what I read at the outset of my presentation. That is a case cited by the Utah Supreme Court where they talk about the meaning of a dismissal under the statute of limitations. I think that to equate the concept of forever barred with prejudice is not a leap. I think that's what it means. The concept of forever barred means that it's done with prejudice. That's what with prejudice means, you can't refile. So I think the Lusk case does set up the legal argument for what we're talking about here.

I was interested in counsel's reference to lesser included offenses. That is something I addressed, and he seems to suggest, that in effect sexual abuse of a child is a lesser included offense of aggravated sexual abuse of a child. Therefore we can exercise our prosecutorial discretion a second time when we knew we were going to lose on the first one. Of course, we could have exercised that prosecutorial discretion back then and we wouldn't have this problem. But now we get to do it a second time. Clearly it's a lesser included offense so what's the big deal?

Well, again, I call the court's attention, since we're talking about case law, none of which was cited by the state, [15] to State versus Barber in 1983. It's contained on page seven of my memorandum. It's interesting in this case, and you put yourself, Your Honor, you've tried enough jury trials as an attorney and as a judge, when we get to that point in the case of deciding how to instruct the jury and we have this case before you and the case is – let's say it's the aggravated sexual abuse of a child case. That's the

case where there has to be certain facts presented. And the only think that makes it aggravated is either that there are more than one incidents or, two, that the person is in a position of special trust.

Now, if that's in fact what the state proves in their case, and it's clear that there were more than one and that the individual qualifies, as a matter of law, as a person of special trust, I wouldn't get a lesser included offense of sexual abuse. I couldn't come to the court then as the defense counsel and say we want the lesser included offense, because there's no basis for it. If the court found no basis for it factually, it wouldn't give it. And the same thing applies to the state. If there's no basis for it, then they can't get it either.

The fact is in this case we're dealing with a legal fiction. Their case was aggravated sexual abuse of a child. They charged it that way. They said certain activities occurred which fit the statute. That it occurred either [16] multiple times, and that's the section they cited, either multiple times, and they've alleged ten of them in the information. So there the aggravated sexual abuse statute applies. Or that he's in a position of special trust because he was an uncle in this case in effect.

Now, what's changed about that in the new prosecution? Are they going to stand up and say, well, there really weren't ten? No, he really isn't? That's the ridiculousness of the state's position. Their case was an aggravated sexual abuse of a child case and

it's barred by the statute of limitations. They can't come back and cure it now by saying we exercised, in effect, our prosecutorial discretion incorrectly the first time so we get to do it again.

That's it. Thank you.

THE COURT: Counsel help me out a little bit on this procedurally. I have in the file an original information. I can't see anything where that was dismissed. Help me out. Was there an order dismissing that?

MR. CAINE: There should be. It was done in a phone conference with the court.

THE COURT: Did either attorney prepare an order?

MR. CAINE: I don't know. I don't know whether the court just did that. It was done in a phone conference.

THE COURT: As I recall, and quite frankly, as I look at the notes that the clerk made at the time, and we [17] could go back I guess and look at it, but I think that was February 23rd, was it not?

MR. CAINE: I believe that is correct.

THE COURT: We discussed the case. I think it was set for the next day to argue.

MR. CAINE: And we struck it then. That's correct.

THE COURT: And then, in a memorandum in opposition to the defendant's motion to dismiss, the state conceded in their argument that the charges of forcible sexual abuse in counts 11 through 20 were time barred by the statute of limitations.

MR. CAINE: Correct.

THE COURT: Then it says the state concedes that charging aggravated sexual abuse of a child in counts one through ten of the original information are time barred by the statute of limitations. It goes on to talk about that the defendant may be prosecuted for sexual abuse of a child, a second degree felony, committed within the time of the charge period. Then they filed their amended information.

MR. CAINE: That's right.

THE COURT: I think that procedurally that's where we're at. I don't think an order was ever entered.

MR. CAINE: My recollection is we had a phone conference on that. There may be a minute entry about that. Because you're right, the next day was going to be the oral [18] argument.

THE COURT: And then they conceded?

MR. CAINE: Yeah. The situation was all right, those charges would be dismissed. Then the state filed their new information.

THE COURT: I just bring that up because on appeal it very well may be that the appellate court

would look at that procedural aspect of it as to whether or not there was a dismissal or a concession and so the other charges were filed. I don't know.

MR. CAINE: I'm certainly happy to prepare an order that memorializes that conversation and submit it to the court.

THE COURT: I think that would be probably appropriate. We need to put the time frames in there in that order.

MR. CAINE: I'll do that.

THE COURT: All right. As I see it we have two problems, or two issues, before the court here today. One is the double jeopardy issue and the other is which statute of limitations applies. It's pretty well conceded in your briefings, counsel, but I don't think anybody has given me an exact date as to when it's alleged that this crime was – this alleged crime was reported to law enforcement. Somebody help me out here.

[19] MR. BAIRD: I don't know that it's in – it might be in the very first motion to dismiss.

MR. CAINE: I have the first one. Let me look and see if that's in there, Your Honor.

(Pause in the proceedings.)

THE COURT: Somewhere in here I think one of you attached a copy of a police officer's report. Maybe that's the time of the first alleged reporting. I guess we can refer to that.

MR. CAINE: It's the first report to a police officer. I think that would be correct, Your Honor.

THE COURT: Okay. Let me find that.

MR. BAIRD: Is that detective – there's Detective Richard Jacobsen, a report from him, and also Lyle Davis. I think it's contained in the same report. We have Lyle Davis who was the patrolman who took the initial report. It shows May 14th of '04.

MR. CAINE: Yeah.

MR. BAIRD: And then Richard Jacobsen has a supplemental report August 9th of 2004 and follows up on the initial complaint.

MR. CAINE: And the information was filed on the 12th of August.

THE COURT: Very well. I'm going to deal with which statute of limitations applies first, that issue, and then [20] from there I'll address double jeopardy.

I think Lusk is definitive on that. The holding in Lusk is if the statute is run on a cause of action so that it is dead, it cannot be revived by statutory extension. But if the cause of action is still alive the new enactment can extend the time in which it may be brought. The court finds that the 1991 legislative action, which deleted the eight years and made it – extended the statute to four years from the time that it was reported applies in this case. In as much as it was reported, by proffer here from counsel, May 14th,

2004, the court finds that the – that that would be the applicable statute of limitations and therefore it wouldn't be barred by the statutory statute of limitations.

The question is does double jeopardy apply? Even though, Mr. Caine you've argued that Lusk addresses that, I don't find that to be the case. For some reason it seems like this court is called upon to plow new ground in the area of aggravated sexual abuse and sexual abuse of a minor. Lusk, of course, is a landmark case in that. I was reversed when I made my ruling on that. I very well may be reversed here, but I find that due process is not violated and that the state had the right to file an amended information that was not double jeopardy.

Mr. Caine, you make a very eloquent argument. If you want an interlocutory appeal, the court would allow you to do [21] that. It may be an area that we need some further enlightenment on and they can explore this as they did in Lusk. But I don't think it's an area that has been explored or ruled on by the appellate courts and it very well may be a first impression here. So, the court will deny the motion to dismiss on those grounds.

Mr. Baird, will you prepare an order to that effect?

MR. BAIRD: Yes.

THE COURT: We may want some specific findings in there as relates to the due process and prosecutorial discretion.

MR. BAIRD: I'll consult with counsel about findings.

THE COURT: If you will.

MR. CAINE: And I'll prepare an order on the first one and have Tony approve that as to form.

THE COURT: I think that would be appropriate to at least put it in a posture for appellate review if need be.

MR. CAINE: And then if we could have a time period to make the decision on the interlocutory appeal. I suspect were going to do that.

THE COURT: Counsel, if your client will waive the right to a speedy disposition, and he has in the past as I note from the file, but I think it would be appropriate at this point in time to do that, to allow you time to evaluate [22] your decision.

MR. CAINE: Mr. Cahoon, the court has, in a sense, indicated that it is not adverse to continuing this matter to allow us to pursue an interlocutory appeal of the decision the court has made today. That would require a filing with the appellate court. I think that's likely to happen. That would obviously continue or delay an ultimate resolution of the case until that's decided. For purposes of allowing that to happen, do you waive your right to a speedy trial?

You need to make that decision in order to allow things to happen.

If we could have a moment, Your Honor?

THE COURT: Go ahead.

(Pause in the proceedings.)

MR. CAINE: Again, the question is, for purposes of allowing that to take place, do you waive your right to a speedy trial?

THE DEFENDANT: Yes, I do.

THE COURT: Very well. Counsel, how much time do you feel would be appropriate before we set this matter back on the calendar for a status conference?

MR. CAINE: I'm going to make that decision within the next couple of weeks, Your Honor.

THE COURT: Let's say about six weeks set it for a status conference. At that point we can see if you've filed [23] an appeal. If not, then we'll set this matter for further hearings.

MR. CAINE: That will be fine.

THE COURT: All right. Let's look to September 26th, 10:00 that morning.

MR. BAIRD: That's fine with the state.

MR. CAINE: That's a good time for us.

THE COURT: We'll designate that as a status conference. Mr. Caine, I have in the file a copy of the amended information. I assume one was faxed to you, but I'll provide you with a copy.

MR. CAINE: I do have one.

THE COURT: Is there anything else that we can take up or should take up as relates to Mr. Cahoon's case?

MR. CAINE: I think that's all today, Your Honor. Thank you.

MR. BAIRD: Thank you.

(Hearing concluded at 10:45 a.m.)

[Certificate Omitted In Printing]

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IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DWIGHT ARTHUR CAHOON [Home Address Omitted] [Date Of Birth Omitted] Defendant.	**AMENDED INFORMATION** Case No. 041100622 Judge Clint S. Judkins OTN #: 12388682

The undersigned Tony C. Baird, Deputy Cache County Attorney, under oath states on information and belief that the defendant, in Cache County, State of Utah, committed the following crime(s):

COUNT 1:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1989, under circumstances

not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 2:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1989, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 3:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1989, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial motional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 4:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1989, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a

child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 5:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1989, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 6:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, under circumstances

not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 7:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 8:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1990, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 9:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1990, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a

child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

COUNT 10:

SEXUAL ABUSE OF A CHILD, a second degree felony, in violation of Utah Code Ann. § 76-5-404.1(1), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indecent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant

This information is based on evidence obtained from the follcwing witness(es): Richard Jacobson, LCPD

Authorized this January 28, 2005 for presentment and filing:

By /s/ Tony C. Baird
Tony C. Baird
Deputy Cache County Attorney

Presented and filed this ___ day of _____, 2005.

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IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DWIGHT ARTHUR CAHOON [Home Address Omitted] [Date Of Birth Omitted] Defendant.	**INFORMATION** Case No. Judge OTN #: 12388682

The undersigned James M. Swink, Deputy Cache County Attorney, under oath states on information and belief that the defendant, in Cache County, State of Utah, committed the following crime(s):

COUNT 1:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1989, the defendant,

touched the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 2:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1989, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 3:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1989, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 4:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

> That DWIGHT ARTHUR CAHOON on or about Summer of 1989, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more

of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 5:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON, on or about Summer of 1989, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 6:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or

gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 7:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 8:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties

with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 9:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, the breast of a female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 10:

AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony, in violation of Utah Code Ann. § 76-5-404.1(3), as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1990, the breast of a

female child younger than 14 years of age, or otherwise took indicent liberties with a child, or caused a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and in conjunction with the foregoing, one or more of the aggravating circumstances described in U.C.A. Section 76-5-404.1(3) is present.

COUNT 11:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1991, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 12:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1991, touched the anus, buttocks, or any part of the genitals of

another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 13:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1991, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 14:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1991, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise

took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 15:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1991, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 16:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1992, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial

emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 17:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Sumner of 1992, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 18:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1992, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the

sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 19:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1992, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

COUNT 20:

FORCIBLE SEXUAL ABUSE, a second degree felony, in violation of Utah Code Ann. § 76-5-404, as follows:

That DWIGHT ARTHUR CAHOON on or about Summer of 1992, touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the

consent of the other, regardless of the sex of any participant.

This information is based on evidence obtained from the following witness(es): Richard Jacobson, LCPD

Authorized this August 11, 2004 for presentment and filing:

By /s/ Jamie M. Swink
James M. Swink
Deputy Cache County Attorney

Presented and filed this ___ day of _____, 2004.

(2)

No. 08-1387

SUPREME COURT, U.S.
FILED
AUG 31 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DWIGHT CAHOON,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court consider whether a pretrial dismissal on statute of limitations grounds is an acquittal for double jeopardy purposes when there is no split of authority on that issue?

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STATEMENT OF THE CASE

1. *Summary of the facts.* Petitioner, Dwight Cahoon, sexually abused his minor sister-in-law "at least every other day" while she lived with Cahoon and his wife during the summers of 1989 to 1992. R. 54-55. The victim reported the abuse to police in May 2004. R. 53, 54. Cahoon admitted his crimes to the victim, to his wife, and to police. R. 55.

2. *Summary of the Proceedings.* In 2004, the State charged Cahoon by information with ten counts of aggravated sexual abuse of a child, a first degree felony, in violation of UTAH CODE ANN. § 76-5-404.1 (West 2004), and ten counts of forcible sexual abuse, a second degree felony, in violation of UTAH CODE ANN. § 76-5-404 (West 2004). R. 1-7. Cahoon moved to dismiss all of the charges on the ground that the statute of limitations had expired. R. 32-42.

In response, the State conceded that the statute of limitations had expired and filed an amended information charging ten counts of sexual abuse of a child, a second degree felony, in violation of UTAH CODE ANN. § 76-5-404.1 (West 2004), an offense for which the statute of limitations had not expired. R. 43-47, 48-64. The charges in the amended information were based on the same conduct that supported the original charges. R. 43-47, 48-64. Based on the State's concession, the trial court dismissed with prejudice all twenty counts in the original information. R. 65-66, 102-04, 175:3.

Cahoon then moved to dismiss the amended information, arguing that its filing violated the federal and state Double Jeopardy and Due Process Clauses. R. 71-81. The trial court denied the motion. R. 105-09, 175:19-21. Cahoon entered conditional guilty pleas to two counts in the amended information, reserving his right to raise his constitutional claims on appeal. R. 134-38.

3. *Utah Court of Appeals' Decision.* Cahoon raised both his double jeopardy and due process claims on appeal. R. 158, *State v. Cahoon*, 2007 UT App 269, ¶ 1, 167 P.3d 533. Although Cahoon based his double jeopardy claim on both the federal and state constitutions, the court of appeals considered only the Federal Double Jeopardy Clause because Cahoon "offer[ed] no basis for independent reliance on the state constitution." *See id.* at ¶ 8 n.1 (internal quotation and citation omitted).

In a divided opinion, the court of appeals held that the filing of the amended information violated both the Federal Double Jeopardy Clause and Utah statute. *See id.* at ¶ 15. Relying on *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916), the court of appeals held that Cahoon's case was a rare circumstance where a pretrial dismissal was the functional equivalent of an acquittal, and therefore the Double Jeopardy Clause barred the filing of the amended information. *See id.* at ¶¶ 8-13. The court of appeals did not reach the due process claim. *See id.* at ¶ 15 n.3.

4. *The Utah Supreme Court's decision.* The Utah Supreme Court reversed. *State v. Cahoon*, 2009 UT 9, ¶ 3, 203 P.3d 957. Relying entirely on this Court's precedent, the Utah Supreme Court held that the Federal Double Jeopardy Clause did not bar the filing of the amended information because "jeopardy had not attached at the time of the pretrial dismissal." *Id.* at ¶¶ 11-12, 17 (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977); *Serfass v. United States*, 420 U.S. 377, 391 (1975)).

The Utah Supreme Court also rejected the court of appeals' holding that under *Oppenheimer*, this case presented a "'rare case[ ] in which a pretrial decision functions as an acquittal' and bars 'further prosecution.'" *Id.* at ¶¶ 13-14 (quoting *State v. Cahoon*, 2007 UT App 269, ¶ 12)). The Utah Supreme Court held that *Oppenheimer* applied collateral estoppel rather than double jeopardy principles. The court explained that "*Oppenheimer* stands for the principle that collateral estoppel prevents the government from bringing *identical* charges against a defendant if the original charges were dismissed for violating the statute of limitations." *Id.* at ¶ 14 (emphasis in original) (citing *Oppenheimer*, 242 U.S. at 87-88). Because the amended information charged a different crime than the original information, "neither *Oppenheimer* nor the doctrine of collateral estoppel" applied. *Id.* at ¶ 17.

REASONS FOR DENYING THE WRIT

I. The Utah Supreme Court Correctly Distinguished *Oppenheimer*.

A. *Oppenheimer* is grounded in collateral estoppel principles, not double jeopardy.

Cahoon first asserts that certiorari review is necessary because the Utah Supreme Court "effectively reversed" this Court's decision in *United States v. Oppenheimer*, 242 U.S. 85 (1916). Petition at 4. However, the Utah Supreme Court's interpretation of *Oppenheimer* agrees with this Court's own explanation – that *Oppenheimer* was a collateral estoppel case. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970) ("Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*."). Moreover, Cahoon cites no case, nor is Respondent aware of one, that interprets *Oppenheimer* as he does.

The Government indicted Oppenheimer "for a conspiracy to conceal assets from a trustee in bankruptcy." 242 U.S. at 85. The trial court dismissed the charge as barred by the Bankruptcy Act's statute of limitations. *Id.* at 86. However, in an unrelated case, this Court held that the Bankruptcy Act's statute of limitations did not apply to Oppenheimer's crime. *Id.* The Government then reindicted Oppenheimer on the same offense that had been dismissed. *Id.* In response, Oppenheimer moved to quash the second indictment

on the ground that the offense had already been dismissed for failure to prosecute within the statute of limitations. *Id.* The trial court granted Oppenheimer's motion. *Id.* This Court affirmed. *Id.* at 87-88.

On appeal to this Court, the Government argued that the trial court erred in quashing the second indictment because "the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment[']s protection against double jeopardy]." *Id.* at 87. In other words, the Government asserted that the only bar to Oppenheimer's reindictment was the Double Jeopardy Clause, and because that clause did not apply, the Government could proceed on the second indictment. *See id.*

The Court agreed that the Double Jeopardy Clause did not apply. *Id.* at 88. Referring to that clause the Court stated, "[t]he safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could." *Id.*

However, the Court disagreed with the Government's argument that the Double Jeopardy Clause provided the only protection against reindictment. *Id.* at 87-88. Although the Court did not explicitly name the "other principle" that could bar Oppenheimer's reprosecution, the Court described it as "a fundamental principle of justice" from "the civil law." *Id.* at 88.

The Court also described how this "other principle" operated. *Id.* The Court explained that "a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another." *Id.* at 87. The Court continued, "[a] plea of the statute of limitations is a plea to the merits, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution." *Id.* at 87-88 (internal citations omitted). Therefore, the Court held that although the Double Jeopardy Clause did not apply, the Government was collaterally estopped from reindicting *Oppenheimer* on the identical charge that was previously dismissed as barred by the statute of limitations. *See id.*; *Ashe*, 397 U.S. at 443.

Oppenheimer is confusing because it employs double jeopardy terminology but not double jeopardy analysis. The Court used double jeopardy terminology by referring to the dismissal of Oppenheimer's original indictment as "a judgment of acquittal on the ground of the statute of limitations." *Id.* at 87. The Double Jeopardy Clause bars further prosecution after an acquittal. *See, e.g., United States v. Ball*, 163 U.S. 662, 671 (1896) ("a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offence"). However, as explained, the Court applied collateral estoppel analysis, not double jeopardy. Therefore, despite *Oppenheimer's* use of double jeopardy terminology, the Court did not hold that a dismissal for

failure to prosecute within the statute of limitations is an acquittal that triggers double jeopardy protections.

B. This Court's subsequent precedent confirms that *Oppenheimer* was not a double jeopardy case.

In a subsequent decision, this Court confirmed that *Oppenheimer* was a collateral estoppel case. In *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), the Court stated, "[a]lthough first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*." *Id.*

This Court's subsequent double jeopardy jurisprudence has also silenced any double jeopardy overtones in *Oppenheimer*. The holdings in *Serfass v. United States*, 420 U.S. 377 (1975), and *United States v. Scott*, 437 U.S. 82 (1978), dispel any notion that *Oppenheimer* applied the Double Jeopardy Clause.

In *Serfass*, this Court held that an "acquittal" does not always implicate the Double Jeopardy Clause. 420 U.S. at 390-94. "[T]he language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken." 420 U.S. at 392. The Court continued, "[t]he word itself has no talismanic quality for the purposes of the

Double Jeopardy Clause." *Id.* (citing *Oppenheimer*, 242 U.S. at 88).

The Court concluded that regardless of the basis for a pretrial dismissal, the Double Jeopardy Clause has no application until a defendant has first been placed in jeopardy by the commencement of a trial to decide his guilt or innocence. *See id.* at 391-93. "[A]n accused must suffer jeopardy before he can suffer double jeopardy." *Id.* at 393. Therefore, the term "acquittal" "has no significance in this context unless jeopardy has once attached and an accused has been subjected to the risk of conviction." *Id.* at 392.

By citing *Oppenheimer* to demonstrate that the term "acquittal" "has no talismanic quality for the purposes of the Double Jeopardy Clause," this Court demonstrated that its use of that term in *Oppenheimer* was not intended to invoke double jeopardy principles. *See id.* at 392. Moreover, *Serfass* clarifies that the Double Jeopardy Clause could not have applied in *Oppenheimer* because the original dismissal in *Oppenheimer* occurred before trial. *See id.* at 393.

Likewise, *United States v. Scott* confirms that the dismissal in *Oppenheimer* was not an "acquittal" in the double jeopardy sense. The *Scott* Court held that "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott*, 437 U.S. 82, 97 (1978) (quoting *United States v. Martin Linen Supply*

Co., 430 U.S. 564, 571 (1977)) (alteration in original). Nothing in *Oppenheimer* suggests that the applicable statute of limitations was a factual element of the crime. *See* 242 U.S. at 85-86. Therefore, *Scott* demonstrates that the *Oppenheimer* Court's use of the term "acquittal" was a matter of imprecise drafting, not a holding that the dismissal in *Oppenheimer* was an "acquittal" in the double jeopardy sense.

The Utah Supreme Court did not "reverse" *Oppenheimer*. Rather, its interpretation is in harmony with *Oppenheimer* itself, this Court's own explanation of *Oppenheimer*, and this Court's subsequent double jeopardy jurisprudence. Accordingly, certiorari review is not necessary to address the Utah Supreme Court's interpretation of *Oppenheimer*.

II. There Is No Split Of Authority On This Issue.

Cahoon also contends that certiorari review is necessary because there is a division of authority "as to whether or not a dismissal with prejudice of a criminal charge on the grounds of statute of limitations operates to constitute an acquittal, for double jeopardy purposes." Petition at 7 (bolding and capitalization omitted). He is mistaken.

Cahoon cites no case outside of Utah that has addressed whether a pretrial dismissal on statute of limitations grounds can be an acquittal for double jeopardy purposes. Although he claims that

Oppenheimer was such a case, his interpretation is incorrect for the reasons explained above.

Cahoon claims that the 9th Circuit "held that a pretrial dismissal on statute of limitations grounds bars a subsequent prosecution of the same criminal activity" in *United States v. Hill*, 473 F.2d 759 (9th Cir. 1972). Petition at 11. However, the obscenity charges in *Hill* were not dismissed on statute of limitations grounds. Rather, the district court dismissed the charges based on its pretrial determination "that the materials . . . were not obscene as a matter of law." *Id.* at 760.

Nor does any of the other authority that Cahoon cites involve application of the Double Jeopardy Clause to a pretrial dismissal of criminal charges on statute of limitations grounds. In *Richardson v. Quarles*, No. 94-1869, 1996 WL 250499, at *1 (6th Cir. May 10, 1996), the pretrial dismissal occurred because the complaining witness failed to appear. In *Washington v. United States*, 366 A.2d 457, 460 (D.C. 1976), the indictment was dismissed as insufficient because it failed to charge specific intent to steal. Finally, *Paradise v. CCI Warden*, 136 F.3d 331, 333-34 (2nd Cir. 1998), did involve a pretrial dismissal of a charge on statute of limitations grounds and reindictment on a different charge. However, the opinion does not analyze the Double Jeopardy Clause. Rather, it analyzes the issue under "res judicata" principles. *Id.* at 336-37.

There is a split of authority over whether jeopardy attaches to a pretrial ruling that is an actual acquittal. In dissenting from the denial of a writ of certiorari in *Rodrigues v. Hawaii*, 469 U.S. 1078 (1984), Justice Brennan noted that the issue of "whether jeopardy attaches to an acquittal based upon a resolution of a *factual* element of the crime that occurred [pretrial] . . . has engendered division amongst the commentators as well as a conflict among the Courts of Appeals." *Id.* at 1080-81 (emphasis in original). However, this case does not present the opportunity to address this controversy, because Cahoon's pretrial dismissal was not an acquittal.

"[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott*, 437 U.S. 82, 97 (1978) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)) (second alteration in original). In Utah, "the time an offense was committed is generally not an element which the prosecution must prove at trial." *State v. Fulton*, 742 P.2d 1208, 1213 (Utah 1987). Nor does the statute defining sexual abuse of a child list the timing of the crime as an element. *See* UTAH CODE ANN. § 76-5-404.1(2) (West 2004).[1] Therefore, the dismissal of Cahoon's

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[1] In Utah, "[a] person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit

(Continued on following page)

original charges on statute of limitations grounds was not an acquittal because it did not resolve any factual element of the charged crimes. Because Cahoon was never acquitted, this case does not present the opportunity to address the controversial issue of whether jeopardy can attach to a pretrial acquittal.

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any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant." UTAH CODE ANN. § 76-5-404.1(2) (West 2004).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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